

8



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/879,911	06/14/2001	Max Aebi	8932-471	7179

7590 01/18/2005

PENNIE & EDMONDS LLP
1667 K Street, N.W.
Washington, DC 20006

EXAMINER

REIP, DAVID OWEN

ART UNIT PAPER NUMBER

3731

DATE MAILED: 01/18/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/879,911

Applicant(s)

AEBI ET AL.

Examiner

David O. Reip

Art Unit

3731

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 30 December 2004.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-35 is/are pending in the application.
- 4a) Of the above claim(s) 5,7-16,19,23-25 and 27-29 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 26 and 30-32 is/are allowed.
- 6) ☒ Claim(s) 1-4,6,17,18,20-22 and 33-35 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 30 December 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Drawings

The drawings were received on 12/30/04. These drawings are accepted.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this

Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claims 1-4, 6, 17, 18, 20-22, and 33-35 are rejected under 35

U.S.C. 102(a) as being anticipated by Ray (WO 98/34552). Figs. 6, 7, and 8B of Ray show a distractor device having all the limitations as recited in the above listed claims, including: first and second handles 25; first and second jaws 22, the jaws including at least one curved portion (see area of 33 in Fig. 8B); first and second sets of spaced, integrally attached blades 32, the tips of the blades being curved, thus “including at least one curved portion” (see Fig. 8B); and a distractor mechanism 26-29.

Under the law of anticipation, it is necessary only that the claim in question “read on” the reference. As to functions recited, it is necessary only that the prior art be “capable of” performing the intended function. That being the case, the above listed claims read on Ray and are therefore anticipated. The blades 32 of

Art Unit: 3731

Ray are fully capable of being inserted between adjacent vertebrae in direct contact with the vertebral bodies ("anatomical elements"). Further, the blades of Ray are separated by a dimension sufficient to permit insertion of an "entire" bone fusion implant, i.e. blades 32 are separated by at least the same dimension as the dimension between channels 14 of the fusion cage 10, and therefore are separated enough to permit insertion of the central core preform 27 (an "entire" bone fusion implant) therebetween without the implant contacting the blades.

With respect to method claim 22, applicants have argued that Ray does not disclose, teach, or suggest positioning the first and second sets of blades in contact against spaced apart ends of first and second vertebral endplates, respectively. However, the positioning steps as broadly recited do not preclude intervening elements between the blades and the vertebral endplates, such as intervening elements in Ray being the lateral stabilizer channels 14. Stated plainly, the method disclosed by Ray includes the tips 32 abutting channels 14 on one side and the channels 14 abutting the vertebral endplates on the other side; thus the tips 32 are "in contact" with the vertebral endplates, since the scope of the limitation "in contact" includes both direct and indirect contact. Such an arrangement meets the recited "positioning" limitations and therefore Ray anticipates the claim.

Allowable Subject Matter

Claims 26 and 30-32 are allowed.

Art Unit: 3731

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

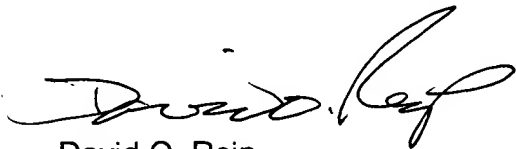
A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to David O. Reip whose telephone number is 703-308-3383. The examiner can normally be reached on 7 A.M.- 4 P.M. Mon-Thu and every other Fri..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anhtuan Nguyen can be reached on 703-308-2154. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Art Unit: 3731

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

A handwritten signature in black ink, appearing to read "David O. Reip", with a stylized, flowing script.

David O. Reip
Primary Examiner
AU 3731